No. 89-515 (5)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

Rochester, New Hampshire, School District,
Petitioner

v.

Timothy W., by and through his Mother and Next Friend, Cynthia W.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MOTION FOR LEAVE TO FILE AND AMICI CURIAE BRIEF OF THE NATIONAL SCHOOL BOARDS ASSOCIATION AND THE AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

GWENDOLYN H. GREGORY
Counsel of Record

Deputy General Counsel
National School Boards Association
1680 Duke Street
Alexandria, Virginia 22314
(703) 838-6712

AUGUST W. STEINHILBER
NSBA General Counsel

THOMAS A. SHANNON
NSBA Executive Director

American Association of School Administrators
1801 N. Moore Street
Arlington, Virginia 22209
(703) 528-0700

No. 89-515

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

Rochester, New Hampshire, School District,

Petitioner

v.

Timothy W., by and through his Mother and Next Friend, Cynthia W.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MOTION OF THE NATIONAL SCHOOL BOARDS ASSOCIATION AND THE AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS FOR LEAVE TO FILE AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

The National School Boards Association (NSBA) is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school board of the Virgin Islands. Established in 1940, NSBA is the only major educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

All public school districts receive or are eligible to receive funding under the Education for All Handicapped Children Act, 20 U.S.C. § 1401 et seq. (EAHCA).

The American Association of School Administrators (AASA) is the national

professional organization for local school district administrators and other educators in our nation's public schools. AASA's members include more than 18,000 school district superintendents, other school district administrators, school principals and other building level administrators, and educational administrators from other local, regional, state, and national educational agencies.

Public school administrators are required to implement programs under the EAHCA and related state statutes. Administrators are concerned with implementing educational programs in a manner that is of benefit to all students -- both those who qualify for federal support under EAHCA and those who are in the regular instructional program.

The potential impact of the First

Circuit Court of Appeals decision, if followed as precedent by other jurisdictions, is much broader than the consequences it has for the parties involved. It could affect the expenditure of educational funds in every school district that receives federal monies under the EAHCA. NSBA and AASA as national educational organizations, have a strong interest in and unique perspective on the issues presented by this case. Petitioner has consented to the filing of this brief. Therefore, Amici request this Court to grant them leave to file the attached brief.

Respectfully submitted,

Gwendolyn H. Gregory
Deputy General Counsel
Counsel of Record

National School Boards Association
1680 Duke Street
Alexandria, VA 22314
(703) 838-6712

August W. Steinhilber
NSBA General Counsel

Thomas A. Shannon
NSBA Executive Director

American Association of School
Administrators
1801 N. Moore Street
Rosslyn, VA
(703) 528-0700

TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE..... 2

STATEMENT OF THE CASE..... 4

REASONS FOR GRANTING THIS WRIT..... 4

ARGUMENT..... 5

1. The court of appeals has expanded the coverage of the EAHCA beyond that indicated in the plain language of the statute.... 5

2. The court of appeals erred by adopting its own factual findings without ruling that the district court's findings were "clearly erroneous."..... 17

3. In failing to distinguish between "special education" and "related services" the court of appeals ignored this Court's interpretation of those terms and set precedent that may result in a substantial increase in the cost of serving handicapped students..... 19

CONCLUSION..... 34

APPENDIX

TABLE OF AUTHORITIES

CASES: PAGE

Abrahamson v. Hershman, 701 F.2d 687 (1st Cir. 1983)..... 28, 32

Birmingham and Lamphere School District v. Superintendent of Public Instruction of Michigan, 328 N.W.2d 59 (Mich. Ct. App. 1982)..... 28

Case No. 10571 (June 19, 1981) 3 EHLR 502:315, 316..... 31

Detsel v. Board of Education of Auburn Enlarged City School District, 820 F.2d 587 (2d Cir. 1987) cert. denied, 108 S.Ct. 495..... 28

Gladys J. v. Pearland ISD, 520 F.Supp. 869 (S.D. Tex. 1981)..... 32

Kruelle v. New Castle County School District, 642 F.2d 687 (3rd Cir. 1981)..... 32

Irving Independent School District v. Tatro, 468 U.S. 883 (1984).....21, 22

Matthews v. Campbell, 3 EHLR 551:264 (E.D. Va. 1979)..... 32

Maurits v. Board of Education of Hartford County, Civil B-83-1746 (D. Md. Sept. 16, 1983) 1983-84 E.H.L.R. Dec. 555:364..... 23, 24

Max M. v. Illinois State Board of Education, 629 F.Supp. 1504 (N.D. Ill. 1986)..... 28

Mills v. Board of Education of the District of Columbia, 348 F.Supp. 866 (D.D.C. 1972)..... 9

Nassau County v. Arline, 106 S.Ct. 1123 (1987)..... 8

North v. District of Columbia Board of Education, 471 F.Supp. 136, 141 (D.D.C. 1979)..... 29, 32

North Carolina Dept. of Transp. v. Crest Street, 107 S.Ct. 336, 341 (1986)..... 16

Parks v. Pavkovic, 753 F.2d 1397 (7th Cir. 1985)..... 32

Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania, 334 F.Supp. 1257 (E.D. Pa. 1972).... 10

White v. New Hampshire Dept. of Employment Security, 445 U.S. 445, 451 (1982)..... 16

STATUTES:

Education for All Handicapped Children Act, 20 U.S.C. § 1401 et seq. ..... passim

§ 1401(1)..... 6, 22

§ 1401(17)..... 20

§ 1401(18)..... 20

§ 1401(19)..... 26

§ 1412(1)..... 19

Rehabilitation Act of 1973
Section 504, 29 U.S.C. §
706(7)..... 7, 8

OTHER AUTHORITIES:

Appendix to Petition for
Certiorari, at 3a..... 15, 16

Letter dated August 6, 1989 from
Lynn Miller to New York Times..... 11

U.S. Department of Education
report "To Assure the Free
Appropriate Public Education of
All Handicapped Children"
(1989)..... 33, 34

34 C.F.R. § 300.5 (1983)..... 22, 23

34 C.F.R. § 300.5(b)(4)..... 27

34 C.F.R. § 300.13..... 23

34 C.F.R. § 300.14, Comment (1)
(1988)..... 27

No. 89-515

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

Rochester, New Hampshire, School District,

Petitioner

v.

Timothy W., by and through his Mother and Next Friend, Cynthia W.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF AMICI CURIAE OF THE NATIONAL SCHOOL BOARDS ASSOCIATION AND THE AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE AMICI CURIAE

The National School Boards Association (NSBA) is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school board of the Virgin Islands. Established in 1940, NSBA is the only major educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

All public school districts receive or are eligible to receive funding under the Education for All Handicapped Children Act, 20 U.S.C. § 1401 et seq. (EAHCA).

The American Association of School Administrators (AASA) is the national

professional organization for local school district administrators and other educators in our nation's public schools. AASA's members include more than 18,000 school district superintendents, other school district administrators, school principals and other building level administrators, and educational administrators from other local, regional, state, and national educational agencies.

Public school administrators are required to implement programs under the EAHCA and related state statutes. Administrators are concerned with implementing educational programs in a manner that is of benefit to all students -- both those who qualify for federal support under EAHCA and those who are in the regular instructional program.

STATEMENT OF THE CASE

Amici incorporate by reference the statement of the case in Petitioner's brief herein.

REASONS FOR GRANTING THIS WRIT

1. The court of appeals has expanded the coverage of the EAHCA beyond that indicated in the plain language of the statute.

2. The court of appeals erred by adopting its own factual findings without ruling that the district court's findings were "clearly erroneous."

3. In failing to distinguish between "special education" and "related services," the court of appeals ignored this Court's interpretation of these terms and set precedent that may result in a substantial increase in the cost of serving handicapped students.

ARGUMENT

1. The court of appeals has expanded the coverage of the EAHCA beyond that indicated in the plain language of the statute.

The Education for All Handicapped Children Act is neither a civil rights statute nor a public welfare statute designed to assure that the basic health and social needs of children are met. It is an education funding statute and the obligations set out in the Act and the substantive rights conferred under the Act, are all part of the funding conditions relating to the provision of educational services. As shall be demonstrated, the plain language of the Act does not support the position that the Act precludes consideration of a child's capacity to benefit from education in determining whether a school must provide services under the EAHCA.

The court of appeals decision is replete with references from the congressional committee reports and floor debate on the EAHCA to the use of the phrase "all handicapped children." Under the court of appeals' analysis, "the plain meaning" of the statute is to require the provision of services to all handicapped children. What the court fails to recognize is that the plain language of the Act also defines "handicapped children," and therefore the word "all" refers only to those handicapped children that fit within the definition.

Section 1401(1) of the Act defines the term "handicapped children":

> mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with

> specific learning disabilities, who by reason thereof require special education and related services. (Emphasis supplied).

By definition then, some handicapped children are not covered by the Act. There are disabled children on both ends of the spectrum who do not "require special education" and, therefore, who are not considered to be "handicapped children" under the EAHCA. On one end of the spectrum are those children who are disabled in some way or have a history of, or are regarded as having, a disability but do not require special education because they are capable of participating in the regular education program without it.

Such children may be protected by Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination

against any "otherwise qualified handicapped individual" in federally assisted programs and activities, including school districts. "Handicapped individual" for purposes of Section 504 is defined as:

> [A]ny person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

29 U.S.C. § 706(7).

Thus, a child could be a "handicapped individual" under the Section 504 definition and not be a "handicapped child" under the EAHCA. A simple example might be a child with a history of a communicable disease such as tuberculosis. Although such a child meets the Section 504 definition, Nassau County v. Arline,

106 S.Ct. 1123 (1987), the child would not be covered by the EAHCA unless he or she "requires special education and related services."

On the other end of the spectrum is the child who requires no special education because the child has no capacity to benefit from it. A disabled child "requires" special education only if there is some educational goal which the child can reasonably be expected to meet, however limited that goal may be. If there is no goal that can reasonably be achieved, the child does not fall within the EAHCA definition, and the district has no obligation to provide services under the Act.

Congress cited as a basis for the EAHCA the orders in the landmark cases of Mills v. Board of Education of the

District of Columbia, 348 F.Supp. 866 (D.D.C. 1972), and Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania, 334 F.Supp. 1257 (E.D. Pa. 1972), in order to assist school districts in funding education programs for these children with the goal of achieving "self sufficiency" or "some degree of self care." Id. at 1259. Nothing in these cases or the words of the statute precludes a trier-of-fact from making the determination that a particular child does not "require special education" because there is no reasonable educational goal which he or she is capable of meeting. The district court found that Timothy W. was incapable of either achieving self sufficiency or any degree of self

care.

Recently Lynn Miller, a physical and occupational therapist and one of the witnesses for Timothy W., wrote a letter to the New York Times concerning this case. (At the time this brief was filed, the letter had not been published by the Times. A copy of the letter is included in Appendix A.) The letter addresses a crucial question in this case -- what is "education?"

August 6, 1989

To the Editor:

Recently the Times published an article regarding the United States Court of Appeals decision that all children must be educated by their public school districts no matter how severe their disability or whether they can show any benefit.

The article described therapists testifying in 1984 that the child (Timothy W.) 'could hear, see bright lights

and respond to music, touching and talking'. I was one of those therapists.

I've changed my mind. I would not testify for him now. It is not what I said at the time that I would change for it is still an acccurate statement. Timothy W. can still hear sound, see bright lights and respond to touch. That is all he could do then, and that is all he can do now, even after five years of daily exposure to teachers, therapists and special education programs.

What I now strongly believe is that the ability to respond to basic sensations does not indicate that learning can take place.

The POTENTIAL FOR CHANGE is what is important to determine when recommending that a child receive educational services. This means that the child must have sufficient mental or physical abilities to learn something new. There can be no Individualized Educational Plan for anyone incapable of learning. What is impossible cannot be mandated.

As the article accurately pointed out, it may sometimes be difficult to prove who will thrive and who will not. The solution might be to give every

child a trial period in a special education program. If at the end of this time, he has not made any changes, the emphasis should shift to being medical and caretaking in nature, not educational. No more educational dollars should be spent on him and because the child will always be dependent on others for care, it is a misuse of teachers' talent as well as valuable classroom space to continue to try to make the child learn something he is simply incapable of doing.

The consequences are devastating.

It is not only a misuse of money, it raises false hopes in the children's families, and it leads to disillusionment. It results in a burnout in teachers, therapists, and social workers. Even if our schools weren't overcrowded, our teachers overworked, it is inappropriate to make them spend day after day with a child who has little or no ability to benefit and is primarily in need of medical or nursing care.

We seem to have our priorities reversed. Instead of giving a little extra help to children who might benefit educationally, we are giving a lot to those who will not.

> After five more years of experience, I can no longer support such totally ineffective effort.
>
> Sincerely,
>
> Lynn Miller, M.Ed., RPT, OTR

The district court, in its findings of fact, agreed with Lynn Miller's current assessment, that Timothy W. cannot benefit from any educational training; that includes "functional" training such as sign language, using the toilet, cooking or dressing or anything else that would increase his independence. He can benefit from a health standpoint from some of the physical therapy. But, the issue here is educational benefit, not medical benefit.

The court of appeals ruled that the district court erred in its conclusion that education is measured by the acquirement of "traditional 'cognitive'

skills." (Emphasis supplied). The district court did not discuss "traditional" cognitive skills. The district court would undoubtedly agree with the court of appeals that education includes "not only traditional academic skills, but also basic functional life skills...." One cannot acquire any skill, regardless of how basic the skill may be, without some level of cognition. Education must lead to volitional, not merely reflexive, behavior.

The court of appeals' list of Timothy's "educational needs" are not educational at all. For example, the court lists several of the "educational needs" recommended by Lynn Miller at the time of trial, which included "postural drainage, motion exercises, sensory stimulation, positioning, and stimulation of head control." Appendix to Petition

for Certiorari, at 3a. Later in its opinion, the court set out another list of so-called "educational needs" from Lynn Miller's report. Id. at 5a.

There is no question that the court of appeals has gone beyond the plain meaning of the statute by expanding the definition of "handicapped children" to include all disabled children regardless of whether they "require special education." As this Court has said in other cases of statutory construction, "if one must ignore the plain language of a statute to avoid a possibly anomalous result, '[t]he short answer is that Congress did not write the statute that way.'" North Carolina Dept. of Transp. v. Crest Street, 107 S.Ct. 336, 341 (1986) (quoting White v. New Hampshire Dept. of Employment Security, 455 U.S. 445, 451 (1982)). In the instant case

the court by not following the language of the Act is not avoiding an anomaly but is creating one. The district court, however, in reading the definition of "handicapped children" to exclude children such as Timothy W. both complies with the plain language of the statute and with the Congress' intent to fund the education of handicapped children.

2. The court of appeals erred by adopting its own factual findings without ruling that the district court's findings were "clearly erroneous."

The court of appeals opinion states that the court did not review the district court's findings of fact, yet the opinion goes to great pains to cite its own version of the facts to support its position that Timothy W. can benefit from a special education. For example, the opinion distinguishes this case from the case of a child in a coma. If the

court of appeals' ruling of law is correct -- that "all handicapped children" means all children with a disability" -- then school districts also have a duty to serve comatose children.

The court purports to rule that ability to benefit is irrelevant. But, the court's discussion of comatose children indicates that it is actually distinguishing on the basis of cognition, concluding that since comatose children are not conscious of their environment, they are incapable of benefitting from an education. While that is true, it is equally true that a particular child that is not "in a coma" in the technical medical sense, may be equally as incapable of understanding or relating to its environment as a child in a coma. That is a factual issue. The district court found, as a matter of fact, that

Timothy was incapable of benefitting from special education because he can acquire nothing more than the "highest level of reflex behavior" which he has already attained. The court of appeals in effect amended the district court's findings of fact. That determination was in error unless the findings of the district court were "clearly erroneous."

3. In failing to distinguish between "special education" and "related services" the court of appeals ignored this Court's interpretation of those terms and set precedent that may result in a substantial increase in the cost of serving handicapped students.

The question of whether a child requires special education is also crucial to a determination of whether "related services" are required to be provided. Section 1412(1) of the EAHCA requires states to assure that all "handicapped children" are provided a "free appropriate public education,"

which is defined in § 1401(18) to include "related services." The primary concern of Amici in this case is that the interpretation of the court of appeals, if followed by other courts, will result in a substantial expansion of the obligation of school districts to provide "related services." If it is indeed irrelevant whether a handicapped child can benefit from education, then the school district must provide whatever health and social services the child needs, regardless of whether they relate in any way to education.

Section 1401(17) of the EAHCA defines "related services" as:

> transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for

> diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children. (Emphasis supplied.)

This Court addressed the issue of the scope of the obligation to provide "related services" in its decision in Irving Independent School District v. Tatro, 468 U.S. 883 (1984). In that case the school district was providing special education services to the child, but the district refused to provide "clean, intermittent catheterization" as a "related service." In a unanimous opinion, the Court held that C.I.C. was a "related service" because the child could not benefit from her special education in the least restrictive environment without it. The key in that case was that the child required special education for a

speech impai.ment and could not attend her special education classes unless C.I.C. was administered to her during the school day. The Court acknowledged that the "related services" requirement surfaces only where the child is receiving special education.

> To keep in perspective the obligation to provide services that relate to both the health and educational needs of handicapped students, we note several limitations that should minimize the burden petitioner fears. First, to be entitled to related services, a child must be handicapped so as to require special education. See 20 U.S.C. § 1401(1); 34 CFR § 300.5 (1983). In the absence of a handicap that requires special education, the need for what otherwise might qualify as a related service does not create an obligation under the Act. See 34 CFR § 300.14, Comment (1) (1983).

Id. at 894.

In Tatro this Court equated the obligation to provide "related services" with the special education services that

are needed by the s

cited by the Court r

> The definitio
> education" is
> important on
> regulations, si
> handicapped unl
> special educat
> definition
> children" in se
> definition of
> (section 300.13
> this definition
> service must b
> child to bene
> education. The
> does not need
> there can
> services," and
> not "handicappe
> under the A
> supplied).

The case of M

Education of Harf

B-83-1746 (D. Md.

1983-84 E.H.L.R. Dec

child with hemophili

provision of phys

"related service."

the school district

udent. The Comment

ads as follows:

n of "special
a particularly
under these
ce a child is not
ss he or she needs
on. (See the
f "handicapped
ction 300.5.) The
related services"
also depends on
since a related
necessary for a
fit from special
efore, if a child
special education,
e no "related
he child (because
") is not covered
t. (Emphasis

urits v. Board of

ord County, Civil

Sept. 16, 1983),

555:364, involved a

who was seeking the

cal therapy as a

The court held that

was not required to

provide physical
service" because t
provided "specia
impairment did not
in school and he
of benefitting fr
without physical t
in Maurits, Timo
benefit from "sp
therefore, the
similarly not
"related services"

The court of
case erred in atte
services" into
Although there
distinction betwee
related services,
provide any rela
related to the spe
required to be pro

herapy as a "related
ae child was not being
education." His
affect his performance
as shown to be capable
om physical education
erapy. Like the child
hy W. is unable to
cial education," and
school district is
equired to provide
to him.

appeals in the instant
pting to turn "related
"special education."
is no bright line
special education and
the initial duty to
ted service must be
ial education services
ided.

Although Amici
of "education" under
than the tradition
academic skills, the
of educational goal
child, however limi
be. There must be s
child has potentia
district court mad
that there is no ed
is appropriate for T

A school distr
to provide a parti
because it relate
educational goals of
independence which a
of appeals as the
There would be no
required to be
districts under the
services," if all

agree that the goal
the EAHCA is broader
al goal to acquire
re must be some kind
for the individual
ted that goal might
ome evidence that the
l for change. The
a finding of fact
ucational goal which
mothy.

ct is not obligated
ular service simply
s to the general
self-sufficiency and
re cited by the court
purpose of the Act.
imit to the services
rovided by school
rubrick of "related
hat is necessary to

trigger the requi
relationship to a
goal for a class
The service mus
particular educati
determined to b
individual child.

If the court
that educational
then the provis
1401(19) relating
and services be
Individualized
(I.E.P.), require
provided to all
could merely inc
Thus, "related
required regardle
educational or
educational servi
receiving. The

ement is a showing of
theoretical educational
f handicapped children.
t be related to a
onal goal that has been
appropriate for the

of appeals is correct,
benefit is irrelevant,
ons of 20 U.S.C. §
to educational goals
ome superfluous, and
Education Programs
d by the Act to be
handicapped children,"
lude health services.
services" would be
s of whether they are
"related" to any
es that the child is
line between "related

services" and heal
longer be relevant.

It should als
U.S. Department of
define each of t
"handicapped childr
effect of the hand
performance.
regulations define '
follows:

> significantly
> intellectual fu
> concurrently
> adaptive behav
> during the dev
> which adversely
> educational
> (Emphasis suppl

34 C.F.R. § 300.5(b)

The regulation
are concerned
performance. The r
"related services"
the child's physica

h services would no

be noted that the
Education regulations
e subcategories of
n" in terms of the
icap on educational
or example, the
mentally retarded" as

ubaverage general
nctioning existing
ith deficits in
or and manifested
lopmental period,
affects a child's
performance.
ied).

(4).

, like the statute,
about educational
equirement to provide
does not arise from
needs, but from the

child's education
is incapable of p
the school distri
provide services
services cannot r
need.

Parents se
districts pay f
private resi
Abrahamson v. H
(1983); full-time
Board of Educati
City School Dist
Cir. 1987), cert.
complete psychoth
v. Illinois State
F.Supp. 1504 (N.D.
enrichment activi
field trips, Bi
School District
Public Instructi

l needs. If the child
rforming educationally,
t has no obligation to
because the health
late to any educational

k to have school
r room and board in
ential facilities,
rshman, 701 F.2d 223
nursing care, Detsel v.
on of Auburn Enlarged
ict, 820 F.2d 587 (2d
denied, 108 S.Ct. 495;
rapy treatment, Max M.
Board of Education, 629
Ill. 1986); and summer
ies such as camping and
mingham and Lamphere
v. Superintendent of
n of Michigan, 328

N.W.2d 59 (Mich. Ct. App. 1982).

Where courts find it difficult to determine if a service is educational or to separate educational and "related services," they find that the school district must provide all of the services.

> It may be possible in some situations to ascertain and determine whether the social, emotional, medical or educational problems are dominant and to assign responsibility for placement and treatment to the agency operating in the area of that problem. In this case, all of these needs are so intimately intertwined that realistically it is not possible for the Court to perform the Solomon-like task of separating them.

North v. District of Columbia Bd. of Educ., 471 F. Supp. 136, 141 (D.D.C. 1979).

If the ability of a student to benefit from educational services is indeed irrelevant, then the court need

not even make an attempt to assign responsibility for providing services. The schools will be required to provide all health-related, emotional and psychological services to disabled children regardless of the relationship of the service to education.

A New York case exemplifies this issue. The case involved a nine year old child who had developed barely beyond the four month level. Her parents sought a service described as "feeding therapy." The state reviewing authority reversed the local hearing officer's decision which required the district to provide the service as a "related service." The reviewing authority held that "related services" are not required to be provided in absence of an educational program.

> In view of the lack of an educational prescription for this child in the IEP, the hearing officer erred as a matter of law

> in concluding that petitioner must provide feeding therapy as a related service. Such a service might properly constitute a related service if it were necessary to enable a child to stay in a particular facility or program and thereby benefit from special education. However, that is not the case in this appeal....
>
> [I]f petitioner should conclude upon further review that the child's current physical condition is such that there is no educational program appropriate for the child, then there would be no obligation to provide related services. Petitioner must undertake such a review and determine whether an educational program can be provided.

Case No. 10571, (June 19, 1981) 3 EHLR 502:315, 316.

Although the court of appeals is correct that Timothy W. does not seek residential placement in this case, that is not the usual situation in cases involving profoundly retarded children. For example, the plaintiffs in most of the cases cited in the court of appeals

decision sought residential placement rather than education in a day setting. See, e.g., Parks v. Pavkovic, 753 F.2d 1397 (7th Cir. 1985); Abrahamson v. Hershman, 701 F.2d 687 (1st Cir. 1983); Kruelle v. New Castle County School District, 642 F.2d 687 (3rd Cir. 1981); Gladys J. v. Pearland ISD, 520 F.Supp. 869 (S.D. Tex. 1981); Matthews v. Campbell, 3 EHLR 551:264 (E.D. Va. 1979); North v. District of Columbia Board of Education, 471 F.Supp. 136 (D.D.C. 1979). In most cases involving children like Timothy W. the expense incurred by the school district will include not only the so-called "educational" services (which Amici contend are not educational) but also the expenses of residential placement.

The Department of Education has recently issued a report on the cost of

compliance with the EAHCA. The annual report is required by Congress under § 618(f)(1) of Part B of the Education of the Handicapped Act, 20 U.S.C. 1401, 1411 et seq.. The report, "To Assure The Free Appropriate Public Education of All Handicapped Children," is based on surveys of the progress being made in implementing the Act. According to the eleventh annual report published in 1989, which includes data for the 1987-88 school year, the average per pupil expenditure for residential placement and related services was $31,616 for private placements and $28,304 for public placements, id. at Table 40, while the average cost of educating a regular education pupil was $2780, id. at 147. Of the estimated total of $16 billion in public funds expended on educating handicapped children, id. at 118 (only

six percent of which is funded by the federal government under the EAHCA, id. at 147), ten percent is devoted to "related services," id. at xix. In many cases the district is unable to provide "related services" itself and must purchase the services from outside providers. According to the Department's report, the largest cost component in purchased services was related services (44 percent), id. at 122. The court of appeals decision in this case will increase the devastating financial burden currently being felt by school districts across the country.

CONCLUSION

In the context of a public policy discussion, the argument that society has a moral responsibility to care for any

child as severely handicapped as the Plaintiff, has a great deal of merit. But that is not the issue here. The issue is whether the EAHCA requires this school district to serve this child. That determination should be made through the administrative procedures of the Act, taking into account the educational arguments made by both sides.

It is within the province of the administrative officials to determine, where there is a dispute, not only whether the education proposed in an IEP results in a free appropriate public education in the least restrictive setting appropriate to the needs of the child, but also whether the child is a "handicapped child" within the definition of the EAHCA. That requires a determination of whether there is some reasonable educational goal which could

benefit the child.

The court of appeals has taken it upon itself to ignore the plain language of the statute, to devise its own set of facts in order to make the case that Timothy W. is not analogous to a comatose child and to convert the EAHCA's requirement to provide related services necessary for a handicapped child to benefit from his educational program into a mandate to provide all manner of services without regard to their relationship to educational goals. The court erred in all these respects.

Amici submit that the errors of the court of appeals and the financial implications of the precedent on school districts across the country are significant enough to warrant this Court's intervention.

Respectfully submitted,

Gwendolyn H. Gregory
Deputy General Counsel
Counsel of Record

National School Boards Association
1680 Duke Street
Alexandria, VA 22314
(703) 838-6712

August W. Steinhilber
NSBA General Counsel

Thomas A. Shannon
NSBA Executive Director

American Association of School
Administrators
1801 N. Moore Street
Rosslyn, VA
(703) 528-0700

APPENDIX

LYNN MILLER
PHYSICAL AND OCCUPATIONAL THERAPIST
9 Orchard Drive • Durham, New Hampshire 03824
(603) 868-7434

August 6, 1989

The Editor
The New York Times
229 West 43rd St.
New York, NY 10036

To the Editor:

Recently the Times published an article regarding the United States Court of Appeals decision that all children must be educated by their public school districts no matter how severe their disability or whether they can show any benefit.

The article described therapists testifying in 1984 that the child (Timothy W.) "could hear, see bright lights and respond to music, touching and talking". I was one of those therapists.

I've changed my mind. I would not testify for him now. It is not what I said at the time that I would change for it is still an accurate statement. Timothy W. can still hear sound, see bright lights and respond to touch. That is all he could do then, and that is all he can do now, even after five years of daily exposure to teachers, therapists and special education programs.

What I now strongly believe is that the ability to respond to basic sensations does not indicate that learning can take place.

The POTENTIAL FOR CHANGE is what is important to determine when recommending that a child receive educational services. This means that the child must have sufficient mental or physical abilities to learn something new. There can be no Individualized Educational Plan for anyone incapable of learning. What is impossible cannot be mandated.

As the article accurately pointed out, it may sometimes be difficult to prove who will thrive and who will not. The solution might be to give every child a trial period in a special education program. If at the end of this time, he has not made any

changes, the emphasis should shift to being medical and caretaking in nature, not educational. No more educational dollars should be spent on him and because the child will always be dependent on others for care, it is a misuse of teachers talent as well as valuable classroom space to continue to try to make the child learn something he is simply incapable of doing.

The consequences are devastating.

It is not only a misuse of money, it raises false hopes in the children's families, and it leads to disillusionment. It results in a burnout in teachers, therapists, and social workers. Even if our schools weren't overcrowded, our teachers overworked, it is inappropriate to make them spend day after day with a child who has little or no ability to benefit and is primarily in need of medical or nursing care.

We seem to have our priorities reversed. Instead of giving a little extra help to children who might benefit educationally, we are giving a lot to those who will not.

After five more years of experience, I can no longer support such totally ineffective effort.

Sincerely,

Lynn Miller

Lynn Miller, M.Ed., RPT, OTR